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Issue Date: 03 May 2004

Case No.: 2003-LHC-00323

OWCP No.: 02-119197

In the Matter of

DONALD L. FRANS, JR.
Claimant

v.

GENERAL DYNAMICS CORPORATION
Employer

and

TRAVELERS INSURANCE COMPANY
Carrier

Appearances: Gary B. Pitts, Esquire
For Claimant

William C. Cruse, Esquire
For Employer

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for modification under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et. Seq. (the "Act"), and the regulations promulgated thereunder. Donald L. Frans ("Claimant") was awarded temporary total disability benefits in the January 22, 2001 Decision and Order of Judge James W. Kerr (CX 9) and presently seeks modification of that award. Both parties agreed to submit this case by written submission only and this motion was granted in an April 10, 2003 Order Granting Claimant's Motion for Decision on the Record and Establishing Deadline for Submission of Evidence and Argument. Claimant submitted a brief on November 14, 2003. General Dynamics Corporation ("Employer") submitted a brief on February 17, 2004.

I. STIPULATIONS AND CONTENTIONS OF THE PARTIES

The parties stipulated to all issues previously adjudicated and resolved in the January 22, 2001 Decision and Order of Judge James W. Kerr. CX 11. Claimant seeks modification of the previous Decision and Order granting temporary partial disability benefits. Claimant alleges that he is permanently and totally disabled as a result of his employment with Employer. Claimant also seeks compensation for prescription reimbursement, wheel chair replacement and 24-hour home attendant care. (CX 11, Claimant's Brief 9-13).

Employer contends that Claimant is not permanently and totally disabled. Employer requests that Claimant be granted modification for temporary total disability payments "until such time as Claimant receives the proper treatment from his physicians that would allow him to improve both physically and psychologically. (Employer's Brief at 8, 15). Employer also contends that Claimant has not shown the necessity for 24 hour home attendant care, nor has Claimant shown the necessity for the specific wheelchair requested. (Employer's Brief at 15-16.)

The necessity and provision of transfer bars in Claimant's home is not a contested issue, and it has been asserted that this accommodation is scheduled for installation in Claimant's home. (Employer's Brief at 15.)

II. ISSUES

The issues remaining to be resolved are:

1. Whether Claimant has reached maximum medical improvement and is therefore permanently and totally disabled;
2. Whether Claimant is entitled to 24-hour home health care assistance and prescription reimbursement as reasonable and necessary medical treatment for his condition;
3. Whether Claimant's wife is entitled to compensation for her assistance to Claimant;
4. Whether Claimant is entitled to an electric wheelchair and lift as reasonable and necessary medical treatment for his condition.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

Medical Report of Stephen L. Davis (EX 1, EX 3)

The June 13, 2003 medical report is based on the Claimant's medical records and a June 12, 2003 teleconference examination. EX 1. Dr. Davis was also deposed on January 21, 2004. EX 3. Dr. Davis is board certified in occupational medicine, preventive medicine and emergency medicine. EX 3. Dr. Davis opined that progressive neuropathies of an unclear

extent related to the Claimant's Gulf service is the most "incapacitating of his disabilities" causing weakness in legs and right arm. EX 1. The Claimant also experiences "[c]ognitive difficulties in retaining new information" relating to his Gulf Syndrome. EX 1. The physician further opined that the Claimant suffers from post traumatic stress syndrome, depression and arthralgias related to Gulf War Syndrome. EX 1. Dr. Davis noted illnesses unrelated to Claimant's Gulf service including hypertension, hyperlipidemia and esophageal reflux. EX 1. Dr. Davis concluded that the Claimant would be "capable of doing sedentary work if he had a really comfortable place to sit with adequate elevation of his legs, easy mobility to bathrooms and an environment that is not overly stressful mentally." EX 1. Regarding the need for, and the nature and extent of, home care assistance, Dr. Davis stated that wheelchair ramp accessibility and appropriate wheelchair and transfer bars throughout the house were necessary. EX 1. The doctor opined that the Claimant's wife "should in general be able to take care of his needs." EX 1.

Regarding the need for a specialized wheelchair, Dr. Davis asserted that Claimant's current wheelchair is of a "ridiculously small size for his stature" and that a mechanized wheelchair would be appropriate. EX 1. The physician stated that it is not unreasonable for the Claimant to have a wheelchair that allows his legs to be raised because of chronic swelling. EX 1. The doctor's report stated that the Claimant was given a 170% disability rating by the Veteran's Administration and a 100% disability rating by the Social Security Administration. EX 1. Claimant told the physician that he has difficulty sleeping and experiences increasing cognitive difficulty. EX 1. Upon examination, Dr. Davis diagnosed no additional mental illness other than post traumatic stress syndrome and sleep disorder. EX 1. Dr. Davis determined that the Claimant does not have paranoid schizophrenia, epilepsy or multiple sclerosis. EX 1. In his report, Dr. Davis recommended that the Claimant undergo a neurological evaluation and consider taking Trazadone for his sleeping disorder. In a supplemental letter dated October 8, 2003, Dr. Davis opined that a wheelchair that would meet the Claimant's needs would cost between \$5500 and \$6500. The doctor suggested that Claimant undergo "intermittent physical/occupational therapy to maximize [his] mobility." EX 1.

At Dr. Davis's deposition, the parties stipulated that the physician is an expert in occupational medicine, with an emphasis on Gulf War Syndrome. EX 3 at 4. Dr. Davis stated that since 1993 he has seen approximately 250 Gulf War Syndrome patients. EX 3 at 5. The physician opined that although Gulf War Syndrome is irreversible, both physical and occupational therapy could maximize the Claimant's physical functioning. EX 3 at 9. The physician contended that Claimant could benefit from the services of a non-skilled home attendant who would perform primarily heavy household chores rather than medical care. Dr. Davis concluded that it would be sufficient for Claimant to receive such assistance for one or two hours a day. EX 3 at 20-21. The doctor further found that if the Claimant had transfer bars in his bathroom, he would be able to bathe himself. EX 3 at 20. Dr. Davis acknowledged that Claimant's psychological difficulties and prior negative experience with psychiatrists would hinder his ability to work with a psychiatrist or psychologist, but nevertheless believed that additional occupational therapy would increase his level of functioning. EX 3 at 22.

Medical Opinion Report of Dr. John McLeod Griffiss (EX 2, EX 4)

Dr. Griffiss issued a report dated August 12, 2003. EX 2. Dr. Griffiss is board certified in internal medicine and infectious disease. EX 2. The physician participated in the Gulf War in 1991 as a medical officer and has treated over 150 veterans with Gulf War Syndrome. EX 2. He has also directed federally-sponsored research on the illness with investigations of almost 2000 veterans. EX 2. Dr. Griffiss' medical opinion is based on medical records, other medical opinions and a physical examination of the Claimant. EX 2. The physician stated that the Claimant complained of symptoms that fall into all eight categories of Gulf War Syndrome. EX 2. The physician opined that the Claimant suffers from Gulf War-related perceptual apraxia that is progressively worsening. Apraxia affects the Claimant's ability to process the position of his own joints which gives him an impression of falling all the time. EX 2. The physician opined that "[a]s a result, he needs to hold on to a support at all times when attempting to stand, and ultimately sit[.]" EX 2. The physician opined that the Claimant does not need additional aid and attendance and observed that he receives all necessary aid from his wife. EX 2. The doctor also concluded that Claimant would benefit from additional therapy, and he stated:

[a]fter completion of physical therapy and training with short course cognitive behavioral therapy Mr. Frans should achieve a higher level of functioning and engage in activities that do not require prolonged standing. These could include gainful employment . . . Gainful employment in sedentary jobs is not out of reach for Mr. Frans, once he has achieved increased independence and mobility. Treatment should focus on perceptions of instability and include competence-building measures. In the absence of effective treatment, Mr. Frans is totally disabled for any occupation.

EX 2.

Dr. Griffiss was deposed on January 21, 2004. EX 4. The physician stated that the Claimant has deficient ability to interpret his movements, but does not have deficient ability to move. EX 4 at 9. Dr. Griffiss opined that the Claimant's post traumatic stress disorder could be treated with medications and treatment by a psychologist. EX 4 at 11. The doctor observed that if Claimant experiences continuing degeneration of his condition, "the level of improvement that he could achieve might be overcome in time by an increase in disability." EX 4 at 14. The physician stated that it would take between 6 weeks and three months to know whether additional treatment improved the Claimant's functionality. EX 4 at 15. The physician stated that the Claimant needs a motorized wheelchair for mobility, but does not need the chair for leg elevation. EX 4 at 17. Dr. Griffiss concluded "that a part-time, say half-time job where he's mostly in the wheelchair, and in which he's not required to learn new material but rather to do the same thing each day or each work period is not out of reach for him." EX 4 at 19. The doctor stated that the Claimant is able to do some housework but needs help with cooking and washing dishes, which would necessitate a non-skilled attendant for one to two hours a day. EX 4 at 20-22.

Documents relating to medical devices including wheelchairs (EX 5)

These documents detail the pricing and options for various wheelchairs.

Decision and Order in Donald Frans v General Dynamcis Corp. by Judge James W. Kerr (EX 6)

In his Decision and Order of January 22, 2001, Judge Kerr found that the Claimant had proved that his injury was caused by his employment with Employer. The Judge found that Claimant developed Gulf War Syndrome during his service in the Gulf War in Saudi Arabia and Kuwait from September 30, 1990 through December 15, 1991. EX 6 at 30. The court ordered Employer to compensate Claimant for temporary partial disability based on his work related injury. EX 6 at 36.

Deposition of Dr. William Rea (CX 2)

Dr. Rea stated that in January 2002 he diagnosed Claimant with toxic encephalopathy, dermatitis, vasculitis, autonomic dysfunction and sleep disorder related to Gulf War Syndrome. CX 2 at 6-7. The physician found that Claimant experienced various exposures to chemical warfare, as well as oil fires and tank exhaust. CX 2 at 9. Dr. Rea characterized the Claimant's condition as "extremely guarded." CX 4 at 12. In his letter dated September 14, 2001, he concluded that Claimant had reached maximum medical improvement on June 15, 2001. CX 2 at 12-13. The physician opined that the Claimant is unable to work for two reasons:

First, of course, we all know people in wheelchairs work, but that would limit him to certain things. But the other thing is the brain dysfunction and the memory loss and lack of judgment and so on...

CX 2 at 15. The doctor noted that some improvement in Claimant's frontal lobe was found on a brain spectrogram that Dr. Simon performed in 2002. CX 2 at 18. Dr. Rea attributed the improvement to avoidance and nutritional technique. CX 2 at 19.

St. John Medical Center Medical Records (CX 3)

The records detail Claimant's treatment at St. John Medical Center from October 20, 1993 through December 17, 2002. The records indicate that Claimant was treated for Gulf War Syndrome, characterized by autonomic dysfunction, immune deregulation, vasculitis and peripheral neuropathy. CX 3 at 11. A functional capacity evaluation from December 17, 2002 noted Claimant loses his train of thought, and has poor memory and concentration difficulties. CX 3 at 28. The functional evaluation summary found upper extremity weakness and concluded that the Claimant "cannot perform essential job functions of a mechanic in the area of physical demands." CX 3 at 29. The Claimant also exhibited "extremely poor finger and manual dexterity." Id. The summary recommended that the Claimant learn transfer techniques in order to become more independent. Id.

Other Medical Records Concerning Claimant (CX 5)

A January 15, 2002 letter from Dr. Theodore R. Simon stated "[w]hen compared to an analogous examination of Mr. Franz [sic], dated May 16, 2000, significant frontal lobe improvements have occurred. The previously noted decreased frontal activity is no longer

present.” CX 5 at 12. A packed blood cell elements report “intended to be a diagnostic method of assessing insufficiency or excess of elements that have important functions inside blood cells or on blood cell membranes” was normal. CX 5 at 33. It was determined that Claimant had a lesion on the right side of his buccal mucosa, which was removed on August 30, 2000. CX 5 at 52.

Dr. Rea’s records included a neuropsychological consultation report by Dr. Nancy A. Didriksen dated May 22, 2000. CX 5 at 53. The Claimant was referred to Dr. Didriksen by his attorney Gary Pitts “to determine the extent of neuro-cognitive and personality/behavioral dysfunction associated with toxic exposure which occurred while serving in the Persian Gulf[.]” CX 5 at 53. Test results were “clearly inconsistent with prior levels of educational and occupational achievements, strongly suggesting that a decrement in functioning has occurred.” CX 5 at 60. The report stated:

Neuro-cognitive test results indicated intellectual functioning, general neuro-cognitive functioning, and specific neuro-cognitive functioning in the severely impaired ranges, compared with his age peers as well as his age, sex, and educational peer group, with few exceptions. Memory functioning, both verbal and nonverbal, is also severely impaired with scores falling in the extremely low ranges

CX 5 at 63.

In an August 22, 2001 letter, Dr. Rea assigned a 15% impairment rating of the whole body under the AMA guidelines, based on Claimant’s “disturbances of complex integrated cerebral function”. CX 5 at 84. In a June 15, 2001 letter, the physician stated that the Claimant had “met maximum medical improvement and is now permanently disabled.” CX 5 at 85.

Medical Records From Dr. T.M. Vinkat (CX 6)

In his report of May 16, 2003, the doctor noted an impression of “recurrent tracheobronchitis, exacerbation of COPD, hyperlipidemia, degenerative joint disease, hypertension, gout, depression and Gulf War syndrome”. CX 6 at 3. An October 31, 2002 report recorded an assessment of Claimant’s condition that included “Gulf War Syndrome with autonomic dysfunction, immune deregulation, vasculitis, and peripheral neuropathy.” CX 6 at 9. A July 21, 2000 note expressed the physician’s concern about Claimant’s Gulf War Syndrome. CX 6 at 15. A September 7, 2000 report stated that the Claimant “is also concerned about Gulf War syndrome. Discussed with patient the need to continue treatment with specialist in Dallas for this syndrome.” CX 6 at 18.

Medical Records Concerning Claimant From Dr. Garrick Rettele (CX 7)

The records detail treatment given to the Claimant at Southeast Kansas Eyecare Associates in Coffeyville, Kansas on August 30, 2002.

TPD Payments Made to Claimant from 1/9/02 through 12/25/02 (CX 10)

The payments for the period of January 9, 2002 through December 25, 2002 show weekly payments of \$7.25.

Claimant's Amended LS-18 (CX 11)

Claimant requests modification of the previous Decision and Order of the administrative law judge on the issues of the nature of Claimant's disability (permanent versus temporary) and the extent of disability (total versus partial). Claimant also raises the issue of prescription reimbursement and payment for attendant care and ambulatory devices. Attorney's fees and expenses will be presented subsequently.

November 12, 2003 Letter from Dr. Rea (CX 12)

The letter states Dr. Rea's medical opinion that "Mr. Frans requires 24-hour home health care assistance."

Medical Journal Articles Relating to Gulf War Syndrome (CX 16, CX 17, CX 18, CX 19, CX 20, CX 21)

Various medical journal articles document case studies on Gulf War Syndrome and its symptoms were submitted.

News Articles Relating to Gulf War Syndrome (CX 22, CX 23)

A June 3, 2003 Washington Post article reported that "congressional researchers recommended yesterday that Congress ask the Pentagon to triple the number of U.S. troops presumed to be exposed to chemical fallout from the demolition of an Iraqi weapons depot in March 1991 to 350,000, or roughly half of the U.S. forces that served in the Persian Gulf War." CX 22.

A November 2, 2002 Sun Herald article reported that the Department of Veterans Affairs had announced a research initiative into Gulf War illness. CX 23 at 1. The article reported that the announcement "came after a British study discounted stress as a significant cause of mysterious health problems reported by Gulf War veterans and an advisory committee concluded that scientific evidence pointed to neurological damage." CX 23 at 1.

Information Regarding Wheelchair Lift (CX 25)

An advertisement regarding the Braun Under Vehicle Lift (UVL) describes the features of the product, which is designed to make vehicles wheelchair accessible.

Deposition of Donald Frans (CX 1)

Claimant stated he currently has trouble driving due to the stress of traffic, and maintains that he can only drive a car with automatic transmission and power steering. CX 1 at 10. Claimant stated that Dr. Rea advised him that he was concerned about his liver and kidneys because of chemical exposure during the Gulf War. CX 14-15, 18. He testified that he had taken a vaccine for Gulf War syndrome, and also received serotonin and atropine injections but said that he stopped medication when he started hallucinating. CX 1 at 25. Claimant smokes 1 pack of cigarettes per day. CX 1 at 27. Claimant stated that he could not work a 40 hour work week because of episodes of pain, shaking, tremors and stress that occur sporadically without provocation. CX 1 at 29. Claimant described the problems he has with gripping and weakness in his arms that he ascribed to toxic exposure. CX 2 at 35. Claimant stated that he suffers from a severe rash problem, degenerative joint disease, gout, hypertension, gastrointestinal reflux disease and hyperlipidemia attributable to his exposure during the Gulf War. CX 1 at 46, 49-50. Claimant stated that there was no family history of these illnesses. CX 1 at 50.

Claimant stated that he is "totally dependent on my wife . . . If it wasn't for my wife, I would need a total full-time caregiver" CX 1 at 29. Claimant requested that his medical expenses be paid and also asserted that his wife deserves compensation for her time caring for him because his care prevents her from working. CX 1 at 40. Claimant stated that he receives approximately \$1500.00 per month from Social Security disability, and \$3000.00 per month from the Veterans Administration. CX 1 at 31, 37. He currently receives \$7.25 in compensation for his Gulf War claim. CX 1 at 43. Claimant receives \$300 per month from a rental property he and his wife own. CX 1 at 42-43. Claimant spends approximately 95% of his day in a wheelchair, and is occasionally bedridden due to his symptoms. CX 1 at 52; 60. Claimant stated that he removed the carpeting from his home and does not use oil based substances upon Dr. Rea's advice. CX 1 at 57-58. He testified that he was advised that he should undergo physical therapy at St. John's Medical Center, which is 77 miles from his home. CX 1 at 65-67.

Deposition of Hilda Frans (CX 8)

Mrs. Frans stated that she married the Claimant on January 27, 1996 and said that they have been together since that time. CX 8 at 4. She stated that she has been in the United States since July 31, 1995 taking care of Claimant and has not been employed here. CX 8 at 9. Mrs. Frans stated that she cannot work because her husband needs constant care, and she described how she assists him:

I have to help him get out of bed, and everything will go in slow motion. I have to help in the bathroom or taking a bath or shower. Depends on his condition. Every day is different. And make breakfast. Having breakfast. Then depends on the weather, we go on the outside to the yard. Then it's pretty much time for lunch, so that needs to be prepared and helping him different ways to the table while he stays in the wheelchair. Very seldom he can go in the chair - - in a regular chair, but, if so, then I got to always behind him. And then afternoon sometimes he is in bed. Some days he don't even get up at all, because of his

condition. Yeah, in the afternoon, then dinner preparing and sometimes we watch TV, the news definitely, and that's pretty much it.

CX 8 at 12-13. Mrs. Frans also stated that she gives her husband his medication. CX 8 at 13. In addition to physical assistance, Mrs. Frans provides her husband emotional support because he becomes nervous and depressed. CX 8 at 17. She believes that her husband's condition is progressively worsening. CX 8 at 39-40.

Mrs. Frans testified that a home aide would cost \$20 per hour, and that medication monitoring would cost an additional \$100.00 per month. CX 8 at 20. Mrs. Frans stated that their house is not handicap accessible. CX 8 at 26. Mrs. Frans testified that she and her stepson now perform the regular maintenance on rental properties that her husband once completed. CX 8 at 48-50. Mrs. Frans stated that the Claimant can occasionally walk around with braces, but for only very short distances. CX 8 at 51. For the most part, the Claimant is restricted to his wheelchair. CX 8 at 52. She stated that the Claimant does not do household chores other than riding the lawn mower occasionally. CX 8 at 52. Mrs. Frans helps Claimant keep his balance when bathing and also feeds him when he is unable to raise his arm. CX 8 at 54. Mrs. Frans dresses her husband when he is unable to do so himself. CX 8 at 59.

Attached to the deposition are exhibits relating to home care and nursing home options for the Claimant. CX 8 at 67-78. A fax from "Home Helpers" states a "One-on-One Services" fee of \$20 per hour. CX 8 at 67. At Atria Assisted Living, the charge for services for Claimant would be \$3175-\$4700 per month. CX 8 at 69. Services for Claimant at Westchase Gables would cost \$2395 per month. CX 8 at 73.

B. Discussion

Section 22 of the Act states, in essence, that any party-in-interest may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in condition. In the case of an award of benefits, the motion for modification must be filed within one year of the last actual payment of compensation. Metropolitan Stevedore Company v. Rambo, 521 U.S. 121 (1997). Modification based on a change in condition may be granted where a claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. Wynn Search Term End v. Clevenger Corp., 21 BRBS 290 (1988).

1. Claimant has not yet reached maximum medical improvement and therefore is not permanently and totally disabled.

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). The burden of proving the nature and extent of disability rests with the claimant. See Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, fn. 5, (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination (Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984)), but it is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. See Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); See Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Construction. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708 (1978). If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

In support of his contention that he is totally disabled, Claimant offers the opinion of Dr. Rea who concluded that Claimant had "met maximum medical improvement" on June 15, 2001. (CX 5 at 85, CX 2 at 12-13). Dr. Rea is board certified in surgery, thoracic surgery, environmental medicine and is certified as a disability analyst. CX 4. The physician opined that Claimant is unable to work because he is limited by his wheelchair and also because of a severe neurological impairment that affects his memory and judgment. CX 2 at 15.

Employer offered contrary opinions of Dr. Davis and Dr. Griffiss, who both stated that Claimant had not yet reached maximum medical improvement. In his report, Dr. Davis found the Claimant to be totally disabled at the time of examination, but stated that there is rehabilitative treatment available that may help Claimant find gainful employment. EX 1 at 8. The doctor recommended that Claimant undergo physical rehabilitation and a new neurological evaluation, and take medication for his sleeping disorder. EX 1 at 8-9. Dr. Davis testified that Claimant's physical and psychological functioning would benefit from physical and occupational therapy. EX 3 at 9, 12. Dr. Davis concluded that Claimant is "capable of doing sedentary work if he had a really comfortable place to sit with adequate elevation of his legs, easy mobility to

bathrooms and an environment that is not overly stressful mentally.” EX 1. Dr. Davis is board certified in occupational medicine, preventive medicine and emergency medicine. EX 3.

Dr. Griffiss, who participated in the Gulf War in 1991 as a medical officer and has treated over 150 veterans with Gulf War Syndrome, opined that without treatment, Claimant is totally disabled. However, the doctor asserted that treatment options are available to the Claimant:

After completion of physical therapy and training with short course cognitive behavioral therapy, Mr. Frans should achieve a higher level of functioning and engage in activities that do not require prolonged standing. These could include gainful employment. . . Gainful employment in sedentary jobs is not out of reach for Mr. Frans, once he has achieved increased independence and mobility. Treatment should focus on perceptions of instability and include competence-building measures. In the absence of effective treatment, Mr. Frans is totally disabled for any occupation.

EX 2.

Dr. Rea, Claimant’s physician, agreed that there was a chance that Claimant’s condition could improve to some degree with proper treatment. CX 2 at 19. The objective medical evidence demonstrates that Claimant experienced improvement in his condition. A January 15, 2002 letter from Dr. Theodore R. Simon stated “[w]hen compared to an analogous examination of Mr. Franz [sic], dated May 16, 2000, significant frontal lobe improvements have occurred. The previously noted decreased frontal activity is no longer present.” CX 5 at 12.

I accord greater weight to the opinions of Drs. Davis and Griffiss. Both doctors agree that additional therapy could improve Claimant’s condition, thereby supporting the conclusion that Claimant has not yet reached maximum medical improvement. Dr. Rea acknowledged that additional treatment could help Claimant, although the physician attributed the improvement in Claimant’s frontal lobe to avoidance and nutritional technique (CX 2 at 19). Therefore, based upon the evidence of record, I find that Claimant's disability is temporary in nature. I further find that Claimant should be provided medical and occupational evaluations and cognitive, occupational and physical therapies, as recommended.

2. Claimant is entitled a motorized wheelchair with a leg extension option and 8 hours of home attendant care as reasonable and necessary medical treatment for his injury.

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a). The medical expense requested must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). It is the Claimant's burden to establish the necessity of treatment rendered for his work-related injury. See generally Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996); Wheeler v. Interoccan Stevedoring, Inc., 21 BRBS 33 (1988); Ballesteros v. Williamette Western Corp., 20 BRBS 184 (1988).

Employer concedes that Claimant is in need of a wheelchair. (Employer's Brief at 14.) Dr. Davis opined that Claimant's current wheelchair is of "ridiculously small size for his stature" and that a mechanized wheelchair would be appropriate. EX 1. The physician stated that it would be reasonable for Claimant's wheelchair to allow Claimant to raise his legs. EX 1. Dr. Davis stated that an appropriate wheelchair for Claimant would cost between \$5500 and \$6500. EX 1. Dr. Griffiss stated that Claimant needs a motorized wheelchair that would allow him to raise his legs. EX 4 at 17-18. The physician opined that "the standard wheelchairs that are used by the Veterans Administration that I'm familiar with would be adequate for him." EX 4 at 17.

I find these opinions persuasive and conclude that Claimant's condition merits a better quality wheelchair than he currently uses. However, Claimant has not adequately demonstrated that his condition requires the specific type of wheelchair he has described. Claimant's brief states that he "should be entitled to a modern electric wheelchair, a wheelchair lift for his vehicle, and maintenance of the same." (Claimant's Brief at 11). Claimant has submitted a brochure that describes vehicle wheelchair lifts but does not include price information. CX 25. Claimant offers no support through medical opinion testimony or other evidence to demonstrate the reasonableness or necessity of a wheelchair lift. Claimant also has not offered objective evidence to specify the model of wheelchair he would find satisfactory. Dr. Davis opined that the wheelchair and lift that Claimant described conforms more with his wants than his needs. EX 3 at 16. There is insufficient evidence of record to conclude that Claimant's request for a wheelchair lift is reasonable and necessary¹.

Employer estimates the cost of Claimant's wheelchair and wheelchair lift specifications to be in excess of \$30,000, though the record does not clearly establish the basis for this cost. (Employer's Brief at 14). Employer has submitted pricing information regarding different wheelchairs, ranging in price from \$5498.00 and \$8970.00, depending on size and options. EX 5. Claimant has not offered contrary evidence regarding the cost and type of wheelchair he requires. As previously stated, Dr. Davis stated that an adequate wheelchair for Claimant would cost between \$5500 and \$6500. In the absence of reliable contrary evidence, I defer to Dr. Davis' opinion and find that Claimant is entitled to a motorized wheelchair, fit for his body frame, that includes an option for a leg extension device, and that costs in the range of \$5500 and \$6500.

The Board has found that modifications to a claimant's home necessitated by his work injury are covered under Section 7 of the Act because the modifications constituted "medical . . . and other attendance or treatment" within the meaning of Section 7. Dupre v. Cape Romain Contractors, 23 BRBS 86, 94 (1989). Accordingly, I find that the evidence establishes that the

¹ I note that Claimant has represented that he drives, and it may be inferred that he is able to enter and exit his personal vehicle by means now available to him.

installation of wheelchair ramps in Claimant's home is reasonable and necessary, and find that Employer is responsible for the cost of such installation.

Claimant alleges that he is in need of 24-hour home attendant care, which is currently provided by his wife. (Claimant's Brief at 11) The Board has held that if an employee's injuries are so severe as to require domestic services, the employer must provide them, even to the extent of reimbursing a family member who performs them. Gilliam v. The Western Union Telegraph Co., 8 BRBS 278, 279-80; Timmons v. Jacksonville Shipyards, 2 BRBS 125 (175). Claimant stated that he is totally dependent on his wife and if not for her, he would need a full-time attendant. CX 1 at 29. Mrs. Frans stated that if she did not have to care for Claimant, she would work outside of the home. CX 8 at 13. Dr. Rea agrees with Claimant's assertions that he needs in home assistance, as reflected in his correspondence of November 13, 2003. CX 12.

Both Dr. Davis and Dr. Griffiss disagree that Claimant needs a full-time attendant. Dr. Davis opined that the Claimant could use 2 hours of non-skilled home attendant care. EX 3 at 20-21. The physician stated that an occupational therapist should look at Claimant's house to determine what modifications should be made to "maximize independence of functioning in the house." EX 3 at 18. The physician stated that transfer bars in the bathroom would allow Claimant to bathe himself. EX 3 at 20. Dr. Davis stated that Mrs. Frans should not be compensated for activities like making meals because such activities are those of a normal spouse. EX 3 at 18. Dr. Davis opined that Mr. Frans was in need of approximately two hours of assistance "to do really heavy scrubbing of the floors or this or the other thing or giving him some special help here and there[.]" EX 3 at 20. Dr. Griffiss opined that Claimant is able to "bathe himself, he can feed himself, he can take care of his bodily functions, he can do some level of house work around the house using his crutches." EX 4 at 20. The physician opined that Claimant is really only in need of assistance with "cooking and washing dishes." EX 4 at 20. The doctor stated that if Mrs. Frans were to work, Claimant would need help with "meals and light housework." EX 4 at 21. Dr. Griffiss stated that Claimant would be in need of 1-2 hours of nonskilled, nonmedical assistance. EX 4 at 22.

According all deference to the credible testimony of Claimant and Mrs. Frans, I conclude that the record does not sufficiently establish that Claimant requires 24-hour home health care attendance. Dr. Rea's opinion that his condition requires this accommodation is conclusory and lacking in detail. Although the doctor states that Claimant is "wheelchair bound and requires help with most daily activities, including medication and use of the restroom" (CX 12), the evidence reflects that Claimant's physical capabilities have not yet been fully assessed by an occupational expert. In addition, it has been established that the installation of transfer bars and ramps in his home will increase Claimant's independence in bathing and personal care.

Conversely, both Drs. Griffiss and Davis noted a number of activities that Claimant is able to engage in without assistance, and both expected further treatment to improve his physical functioning. Dr. Rea agreed that Claimant could benefit from further treatment. Both Drs. Griffiss and Davis concluded that Claimant's condition required non-skilled assistance to perform household chores for several hours each day. Although I agree with the doctors that the record reflects that the Claimant requires non-skilled assistance rather than skilled medical assistance, I am unable to accord substantial weight to the opinions of Drs. Griffiss and Davis

regarding the amount of assistance that Claimant needs because their conclusions are not completely objective. Both doctors agree that Claimant needs assistance, which they characterize primarily as help with cooking and household chores. In reaching their estimates of required assistance, they declined to include the value of the duties performed by Mrs. Frans. Indeed, Dr. Davis specifically described the duties performed by Mrs. Frans as “the normal care provided by [a] spouse”. However, it is clear that Mrs. Frans’ contributions are necessary and reasonable to care for Claimant’s medical condition, and if she were unavailable, the services would have to be provided by someone else. It is not reasonable to conclude that the assistance she now provides to Claimant could be performed in 1 or 2 hours daily. Nor is it reasonable to expect that Mrs. Frans could continue to provide the level of assistance that Claimant requires if she were to secure full time employment.

In consideration of all of the evidence, I find that Claimant is entitled to the cost of assistance for at least 8 hours a day, which he requires to assure that his meals are prepared, his household chores are completed, his medication is administered, and his personal hygiene needs are met. In reaching this conclusion, I have relied upon the testimony of Claimant and his wife, as well as the description in the record of Claimant’s limitations and abilities, and the medical experts’ opinions regarding his need for help with household chores, meals, and personal hygiene. I note that the record regarding the time and effort expended in administering medication to Claimant is scanty, and I conclude that this activity is de minimus with respect to the overall services provided by Mrs. Frans. The evidence reflects that the type of in-home assistance such as Claimant requires costs between \$13.00 and \$15.00 per hour. Accordingly, I find that Claimant is entitled to 8 (eight) hours of home attendant care at not greater than \$15.00 per hour, commencing from the date of his marriage, January 27, 1996.

Claimant, in his pre-hearing statement, requested prescription reimbursement. Other than referring to medications that he takes, Claimant has offered no evidence to support their cost. CX 11. Accordingly, I find that Claimant has not proved that prescription reimbursement is a reasonable and necessary medical treatment for his injury.

On March 3, 2004, Claimant’s counsel submitted an application in support of attorney’s fees in the amount of \$14,125.00 and expenses in the amount of \$161.80, for the period commencing February 5, 2001, and continuing to present. Counsel cited an hourly rate of \$250.00 for 56.6 hours of work. Counsel averred that the fees and costs set forth in the application were agreed upon by the parties.

I find counsel’s fees and costs are reasonable considering the complexity of the issues involved in this matter, and I hereby approve the parties’ agreement.

ORDER

It is ORDERED that:

1. Employer shall pay for medical and occupational assessments of Claimant to determine the course of treatment required for him to meet maximum medical improvement.

2. Employer shall pay the costs related to physical, occupational and cognitive therapies recommended as the result of medical and occupational assessments, including the costs of transporting Claimant to and from therapy.
3. Employer shall provide Claimant with a motorized wheelchair, equipped with a lift, which is suited to his specific physical needs and corpus. Employer also shall pay for the costs of maintaining the chair. The cost of the wheelchair should not exceed \$6500.00
4. Employer shall provide, or pay the costs of, wheelchair ramps and transfer bars in Claimant's home.
5. Employer shall pay for 8 hours daily of non-skilled daily home care at the rate of not more than \$15.00 per hour, which payment shall continue so long as such medical care is reasonable and necessary. Claimant's wife is entitled to be paid for her services, if she continues to provide them, and is entitled to reimbursement for her services, at the rate of \$15.00 per hour for 8 hours per day, commencing the date of her marriage to Claimant on January 27, 1996.

It is further ORDERED that Employer shall pay to Claimant's counsel, Gary B. Pitts, Esquire attorney's fees in the amount of \$14,125.00 and costs in the amount of \$161.80.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey